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December 20, 1993

+ ADMITTED PA ONLY
* ADMITTED CA ONLY**BY HAND DELIVERY**Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554Re: MM Docket No. 93-254

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Eagle Communications, Inc.; KICU, Inc.; Paramount Stations Group Inc.; Photo Electronics Corporation; Precht Television Associates, Inc.; Ramar Communications, Inc.; Sarkes Tarzian, Inc.; WEEV, Inc.; and WKRG-TV, Inc., licensees of broadcast television stations in varying size markets located throughout the United States, are an original and four copies of their Joint Comments with respect to the Notice of Inquiry in the above-referenced proceeding concerning limitations on commercial time on television broadcast stations.

In the event that there are any questions concerning this matter, please contact the undersigned.

Very truly yours,



Sally A. Buckman

SAB/gfe
Enclosure

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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In the Matter of)
)
Limitations on Commercial Time)
on Television Broadcast Stations)

MM Docket No. 93-254

To: The Commission

JOINT COMMENTS

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SUMMARY

Reimposition of any type of commercial limits would disserve the public interest. Marketplace forces and audience tolerance levels effectively regulate levels of commercialization on television. For example, syndicated and network programming is formatted with a pre-set amount of commercial availabilities that, in the experience of Joint Commenters, clearly does not exceed, and is typically less than, the number of commercial minutes that were permissible under the commercial processing guidelines enforced by the Commission prior to deregulation. Reimposition of commercial limits would also improperly infringe on broadcasters' First Amendment rights.

Changes in the video marketplace since the elimination of the guidelines provide increased justification for the elimination of commercial limits. The sources of video entertainment have grown exponentially, and to survive, broadcast television must be freed of burdensome regulations that are not imposed on other video providers. Reimposition of commercial limits would have the opposite effect. Such limits would impose a record-keeping and monitoring burden on licensees. Such limits would also lead to more erosion of the revenues television stations receive, thereby further weakening the competitive position of the television broadcast industry. Indeed, forcing stations to eliminate the broadcast of program length commercials would deprive many stations of a significant source of revenue,

which, in some instances, has been used to increase news and public affairs programming.

Finally, imposing commercial limits would stifle the innovation that elimination of the commercialization guidelines was intended to and has fostered. This innovation has resulted in program length infomercials and home shopping programming, both of which have gained increasing popularity. Reimposition of some form of commercial limits would likely preclude any programming that is based on a program length commercial format, regardless of its audience appeal or public interest value.

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93-254

JOINT COMMENTS

I. INTRODUCTION

1/ Commercial Television Stations, 98 F.C.C.2d 1076 (1984) ("Deregulation Order"), recon. denied, 104 F.C.C.2d 358 (1986), aff'd in part, remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

that limited the amount of commercial time television stations were permitted to broadcast. In 1984, the Commission eliminated these guidelines, concluding that the appropriate amount of commercial time could be better determined by marketplace forces than by Commission regulation.^{2/} Furthermore, the Commission stated that it could not justify "either the direct costs imposed by adherence to the commercial guideline - the paperwork burden of record keeping, reviewing and monitoring - or its more indirect costs such as possible anti-competitive effects or stifling commercial experimentation and intrusion into the realm of commercial speech protected by the First Amendment."^{3/}

In the Notice, the Commission now seeks comment on whether changes in the television industry since 1984 justify reestablishing some form of commercial advertising limits. Joint Commenters respectfully submit that industry changes have provided further justification for the Commission's deregulation of television advertising, and that reimposition of any commercial limits would therefore dramatically disserve the public interest.

^{2/} Deregulation Order, 98 F.C.C.2d at 1105.

^{3/} Id. at 1103.

II.
COMPETITION AND AUDIENCE SELECTION CONTINUE
TO FUNCTION AS EFFECTIVE REGULATORS

The Commission eliminated processing guidelines with respect to television advertising time primarily because of compelling evidence that market incentives were the decisive factor in determining appropriate levels of television commercialization.^{4/} Specifically, the Commission concluded that competition and audience selection would most effectively control levels of commercialization, because "if stations exceed the tolerance level of viewers by adding 'too many' commercials the market will regulate itself, i.e., the viewers will not watch and the advertisers will not buy time."^{5/} This conclusion remains valid today.

Marketplace forces and audience tolerance levels now effectively regulate the amount of commercial time broadcast on television. As Commissioner Quello accurately observes, "[t]he tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for

^{4/} Id.

^{5/} Id. at 1105.

viewers."^{6/} If viewers believe a given program contains too many commercials, they will change channels, or stop watching.

In addition, syndicated and network programs, which comprise the bulk of many television stations' programming, are supplied to stations with a pre-set amount of commercial availabilities. Competition among networks and syndicators for favorable distribution outlets serves to keep these pre-set limits relatively uniform. For instance, a network or syndicated program intended to be broadcast during a half hour slot in prime time typically contains 22 to 24 minutes of program material, leaving six to eight minutes for paid commercials, station promotions and public service announcements.^{7/} In practice, therefore, the amount of commercial time in a given program is limited by the programming production and distribution systems already in place.^{8/}

^{6/} Notice, Separate Statement of Chairman James H. Quello ("Quello"), at 4 (footnote omitted).

^{7/} Significantly, this does not exceed the number of commercial minutes that was permissible under the former processing guidelines, which imposed a sixteen minute per hour ceiling.

^{8/} In fact, much network and syndicated programming is sold to the stations on a barter basis with the bulk of commercial time reserved for the program supplier as "payment" for the station's right to air the program material.

III.
**COMMERCIAL LIMITS WOULD UNNECESSARILY IMPAIR
BROADCASTERS' PROTECTED COMMERCIAL SPEECH**

In eliminating the commercial limits in 1984, the Commission expressed specific concern about regulating program content and the attendant potential chilling effect on commercial speech, and recognized that the regulation of commercial time placed an indirect burden on television stations' First Amendment rights.^{9/} To reimpose such limits today would improperly infringe on broadcasters' First Amendment rights.

Commercial speech is protected by the First Amendment.^{10/} As the Supreme Court has stated,

[t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. . . . In short, such speech serves individual and societal

^{9/} Deregulation Order, 98 F.C.C.2d at 1104.

^{10/} Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

interests in assuring informed and reliable decision making.^{11/}

Indeed, in a recent decision, the Supreme Court struck down a government regulation which "place[d] too much importance on the distinction between commercial and noncommercial speech."^{12/}

When a governmental agency seeks to regulate commercial speech that concerns lawful activity and is not misleading, the asserted governmental interest in such regulation must be substantial.^{13/} Given the lack of evidence of over-commercialization in today's television broadcast marketplace as well as the popularity of (and hence consumer demand for) infomercials and home shopping programming, it has clearly not been established that the Commission has a substantial or legitimate interest in restricting such commercial activity, or that such a restriction would be in the public interest. Even assuming that the Commission has a legitimate interest in limiting television commercialization, to justify imposing limits

^{11/} Bates, 433 U.S. at 364 (citations omitted).

^{12/} City of Cincinnati v. Discovery Network, Inc., ___ U.S. ___, 113 S.Ct. 1505, 1514 (1993) (holding that a city ordinance which forbids the distribution of commercial handbills, but not newspapers, from newsracks on public property violates the First Amendment). See Notice at fn. 16.

^{13/} Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, ___, 109 S.Ct. 3028, 3032 (1989).

it would be necessary for the Commission to demonstrate a "reasonable fit" between this interest and the means it chooses to serve that interest.^{14/} In addition, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."^{15/}

With regard to television commercialization limits, it is clear that less burdensome methods for protecting the public interest exist. No evidence has been presented which demonstrates that reliance on marketplace forces has failed to protect the public interest, or resulted in substantially greater levels of commercialization. In light of the success of market forces in controlling the commercialization of broadcast television, any action by the Commission to eliminate or restrict this form of commercial expression would not be justified.

To the extent the Commission is concerned that commercial limits are necessary to prevent fraud or deception from being perpetrated on the public, other less burdensome rules and policies, in addition to industry self-regulation, provide

^{14/} Board of Trustees, 109 S.Ct. at 3035.

^{15/} City of Cincinnati, 113 S.Ct. at 1510 n. 13.

adequate safeguards. For example, sponsorship identification requirements help to ensure that the audience is fully aware of the sponsored nature of advertisements, including program length commercials.^{16/} Also, the Federal Trade Commission has jurisdiction to review cases of deceptive formats or deceptive product claims, and has been active in enforcing claims with respect to deceptive program length commercials. Furthermore, the National Infomercial Marketing Association has adopted a Policy and Guidelines to assist its members in avoiding consumer confusion or misunderstanding.

IV.

REREGULATION WOULD IMPOSE AN UNDUE BURDEN ON THE COMMISSION AS WELL AS ON LICENSEES OF TELEVISION STATIONS

In 1984, the Commission properly concluded that market forces were effectively regulating the commercialization of television, and thus furthering the public interest. The Commission therefore sought to relieve television stations of the significant and undue regulatory burden associated with its commercialization limits. Reimposition of these burdens cannot be justified in the competitive video marketplace that exists today.

^{16/} 47 C.F.R. § 73.1212.

**A. Licensees and the Commission Would Be
Compelled to Divert Scarce Resources
if Commercial Limits Were Reestablished**

In the Deregulation Order, the Commission recognized that the limits on television advertising time imposed a direct burden on television licensees by requiring them to maintain extensive records to assure compliance with the FCC guidelines.^{17/} If the Commission were to reimpose similar requirements, licensees would again be forced to devote significant resources to the maintenance and review of these records. Requiring television licensees to expend money, time and personnel in the current intensely competitive video environment would disserve the public interest, as licensees would be forced to divert resources from efforts which directly benefit the public, such as the production of news and public affairs programming.

In addition to the record-keeping burden that would be imposed on licensees, reestablishing commercial limits would impose a substantial administrative burden on the Commission's staff. The Commission would likely be faced with the sort of time-consuming review of licensee compliance in which it currently engages in enforcing the advertising limits that apply

^{17/} Deregulation Order, 98 F.C.C.2d at 1103.

to children's programming, except on a much larger scale. In light of the effectiveness of market forces without government intervention, this additional burden would be an unjustified waste of the Commission's limited resources.

**B. Broadcast Television Must Be Allowed to
Compete Freely with Other Video Providers**

The increased burdens that compliance with commercial limits would impose would adversely impact the competitiveness of the television broadcast industry. In 1984, the Commission recognized that broadcasters needed flexibility to compete in the evolving video marketplace.^{18/} The intervening decade has witnessed accelerated change in that marketplace. Today, television stations compete with a multitude of other video outlets. As the Commission has observed, "the industry has experienced an enormous expansion in the number of video outlets available to most viewers and in the alternative sources of video programming."^{19/} The number of television stations increased by 50 percent between 1975 and 1992, from 953 to 1494.^{20/} In

^{18/} Id. at 1104.

^{19/} Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221 (FCC 92-209, released June 12, 1992) ("MM Docket No. 91-221"), at 3.

^{20/} Id. (footnote omitted).

1975 the median household received six broadcast signals, while today, more than half of all households receive ten or more over-the-air television signals.^{21/} Moreover, new program networks have emerged since the Commission's Deregulation Order was issued in 1984, providing further program choices for the consumer.

"At the same time, cable television has grown explosively as a competing force."^{22/} By 1990, over 90 percent of all households were passed by cable and over 60 percent of all television households subscribed.^{23/} More than half of all households receive at least 30 channels, including cable channels.^{24/} In addition, there are now over 100 national and regional cable networks.^{25/} Moreover, other competitive video providers, including home satellite dish systems, MMDS and home videocassette recorders, are increasingly available to consumers,^{26/} and national DBS service is anticipated next year.^{27/} In short, "the sources of video entertainment

^{21/} Id. (footnote omitted).

^{22/} Id.

^{23/} Id. (footnote omitted).

^{24/} Id.

^{25/} Id. (footnote omitted).

^{26/} Id.

^{27/} Quello at 5 (citing MM Docket No. 91-221).

available to U.S. consumers have greatly proliferated"^{28/} and television stations face more competition now than ever before. With such competition present, an increase in the Commission's regulation and oversight would clearly contravene the public interest.

In light of the "stiff competition from other media,"^{29/} there have been many attempts to level the playing field to allow broadcasters to compete freely. For example, the 1992 Cable Act recognizes that broadcast television must be freed of burdensome regulation in order to compete and survive. However, imposition of advertising limits would be contrary to this goal, slanting the playing field in favor of other video providers not subject to the same limitations.

In addition to impairing broadcast television's competitive position as compared to cable and other video providers, commercial limits would visit financial harm on the already struggling industry. Television advertising revenues have generally declined since the Commission eliminated its commercial limits in 1984.^{30/} In fact, network advertising

^{28/} MM Docket No. 91-221 at 4.

^{29/} Quello at 5.

^{30/} See MM Docket No. 91-221 at 4.

revenues peaked in 1984 and have declined since;^{31/} advertising revenues per station have fallen by approximately four percent per year from 1987 to the present.^{32/} As a result, profits of broadcast television stations have also declined steadily.^{33/} To force stations to adhere to an arbitrary regulatory limit on the amount of commercial minutes broadcast would likely further erode the revenues stations receive, thereby exacerbating the industry's competitive problems vis-a-vis other video providers, particularly multi-channel providers.

This would be particularly significant if stations were forced substantially to reduce or entirely eliminate their broadcast of program length commercials or "infomercials." Television stations currently derive significant revenue from the broadcast of infomercials. For instance, the stations owned by some of the Joint Commenters derive between two and eight percent of their national sales revenue from infomercial sponsors. Indeed, the revenues received from infomercials enabled one of the Joint Commenters -- WEVV, Inc. -- to add a local newscast to its program schedule. If it were unable to continue receiving

^{31/} Id.

^{32/} Id. (footnote omitted).

^{33/} Id.

infomercial revenue, it would discontinue the newscast. Removing this revenue source, especially when there is absolutely no evidence that viewers currently believe there is an excess of overall commercial programming, would be contrary to the public interest.

**C. Deregulation Has Allowed Stations to
 Provide Popular and Innovative Programming**

The Commission's deregulation of television commercialization was part of its effort to "provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities."^{34/} The Commission stated that it sought to promote licensee experimentation and increase commercial flexibility, and to allow stations to provide innovative and detailed commercials.^{35/} There is no justification for eliminating this flexibility now.

In the Notice, the Commission observes that when television advertising guidelines were eliminated, the Commission had not contemplated the development of the "home shopping" format, which the Commission defines as a format consisting "predominantly of sale presentations or program length

^{34/} Deregulation Order, 98 F.C.C.2d at 1077.

^{35/} Id. at 1105.

commercials."^{36/} It is clear, however, that home shopping stations would not survive if they did not have an audience. The same is true for infomercials. As the Commission has previously noted, "marketplace forces are applicable [to home shopping stations, and the] format will not be sustained if the sales generated do not support the operation of the television station."^{37/} Reimposition of some form of commercial limits would likely preclude any programming that is based on a program length commercial format, regardless of its audience appeal or public interest value.

In addition, new television stations are able to use home shopping formats to provide a diversity of programming to their communities. While, as the Notice states, the Commission did not foresee the advent of home shopping stations in 1984, this format and the proliferation of longer length commercial programming have fulfilled the Commission's stated goal of fostering innovative and detailed commercial information. Infomercials clearly provide consumers with a level of information about a product that cannot be conveyed in a thirty- or sixty-second spot. Home shopping stations are in fact an

^{36/} Notice at 1.

^{37/} Family Media, Inc., 2 FCC Rcd 2540, 2542 (1987).

innovative way to provide this detailed commercial information. The form innovation takes is seldom predictable, and the Commission should allow licensees to continue to explore new ways to meet the needs of their communities and to provide financial support for the stations' other operations.

V.
CONCLUSION

In 1984, the Commission found no evidence that eliminating its commercialization guidelines would result in increased harm to the public interest. As explained above, there remains no evidence that consumers specifically or the public interest generally are harmed by allowing the market to govern the amount of commercial time each television station airs. In light of the foregoing, the Joint Commenters urge the Commission not to impose regulatory limits on television advertising in any form.

Respectfully submitted,

EAGLE COMMUNICATIONS, INC.,
licensee of stations KECI-TV,
Missoula, Montana, KCFW-TV,
Kalispell, Montana, and KTVM(TV),
Butte, Montana

Respectfully submitted,

EAGLE COMMUNICATIONS, INC.,
licensee of stations KECI-TV,
Missoula, Montana, KCFW-TV,
Kalispell, Montana, and KTVM(TV),
Butte, Montana

KICU, INC.,
licensee of station KICU-TV,
San Jose, California

PARAMOUNT STATIONS GROUP INC.,
and its subsidiaries, licensees
of stations KRRT(TV), Kerrville,
Texas, KTXA(TV), Arlington,
Texas, KTXH(TV), Houston, Texas,
WDCA(TV), Washington, D.C.,
WKBD(TV), Detroit, Michigan,
WLFL(TV), Raleigh,
North Carolina, and
WTXF(TV), Philadelphia,
Pennsylvania

PHOTO ELECTRONICS CORPORATION,
licensee of station WPEC-TV,
West Palm Beach, Florida

PRECHT TELEVISION ASSOCIATES, INC.,
licensee of station KIEM(TV),
Eureka, California

RAMAR COMMUNICATIONS, INC.,
licensee of stations KJTV(TV),
Lubbock, Texas and KKIK-TV,
Albuquerque, New Mexico

SARKES TARZIAN, INC.,
licensee of stations KTVN(TV),
Reno, Nevada and WRCB-TV,
Chattanooga, Tennessee


WEVV, INC.

**licensee of station WEVV(TV),
Evansville, Indiana**

WKRK-TV, INC.

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